

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION

4 AARON WILSON GARNER, ET AL * G-07-CV-221
5 VS. * Houston, Texas
6 BP PRODUCTS NORTH AMERICA, * January 20, 2010
7 INC., *

8 STATUS CONFERENCE

9
10 BEFORE THE HONORABLE KENNETH M. HOYT
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES:

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1 THE COURT: All right. This is Cause
2 Number 2007-221, Aaron Wilson Garner versus BP Products
3 North America, Incorporated.

4 Let me just acknowledge for the record
08:32:14AM 5 that I have before me and have reviewed the plaintiffs'
6 motion for severance and for entry of judgment. The
7 defendant's response in opposition to the plaintiffs'
8 motion for severance and for entry of judgment, as well as
9 memorandum prepared and presented. And then the
08:32:35AM 10 plaintiffs' reply brief and supporting data or documents
11 that were attached to that.

12 I have a couple of questions, and then
13 I'll tell you how I think we need to proceed, and then you
14 can argue with me rather than with each other.

08:32:55AM 15 When Judge Gilmore had this case and you
16 all discussed with her how you were going to proceed, did
17 you agree upon -- when I say "agree," I don't necessarily
18 mean in writing -- but did you have a kind of general
19 agreement as to how you would handle any remaining claims?
08:33:16AM 20 For example, did you agree that you would -- and I think
21 one of the statements I made when we discussed this was
22 that I think we should not try liability over and over
23 again simply to create confusion in the record. We should
24 either try it once and win or lose on that basis, appeal it
08:33:36AM 25 on that basis; or correct it and retry it on that basis.

1 But not try segments or groups of plaintiffs and end up
2 with inconsistent results that would not necessarily
3 resolve the case, and this would then turn out to be more
4 than a lifetime experience for all of us, which I think
08:33:56AM 5 would be totally -- total injustice not only to the
6 plaintiffs and the defendants, but also to the
7 administration of justice.

8 So did you-all agree that you would have a
9 single finding of liability and then figure out what to do
08:34:12AM 10 with the balance, or was there anything in writing?

11 We'll start with you.

12 MR. BUZBEE: Thank you, Your Honor. First off,
13 thanks for moving this. I was in trial yesterday in
14 Cameron County. I appreciate you accommodating me. No, we
08:34:23AM 15 did not. I think we both and we never -- I don't think I
16 ever talked to Jim about any of this -- but we kind of were
17 looking at these as kind of 10 Bellwethers, which really
18 aren't binding on the rest of the group. I'd love it to be
19 binding obviously, in light of the outcome, but with all

08:34:38AM 20 candor, we had no agreement other than choosing 10, trying
21 them, so we could get an idea of what the settlement value
22 of the cases were. And I don't -- and we had this
23 discussion even before we tried the case. I don't think
24 that there's any binding effect on any of the other

08:34:55AM 25 plaintiff's. I wish there was, but I think legally there's

1 not.

2 So I thought the way we were going to
3 proceed was let's see how these first 10 go, and then let's
4 huddle up and see if we can resolve the remaining 150 or
08:35:08AM 5 so. Although for the first time I heard Jim say, I think
6 in a hearing up in Houston, that we may want to do this one
7 more time. So -- which I'm happy to do. I think it's a
8 disservice to the court system and to these plaintiff's.
9 But to answer your question directly, no. We had no
08:35:24AM 10 agreement.

11 THE COURT: Yes.

12 MR. GALBRAITH: That's correct. There is --
13 there was no agreement. We talked about it at the time
14 when Judge Gilmore said, "I want you to get --" you may
08:35:35AM 15 recall, "I want you to get 20 plaintiffs ready for trial.
16 Discovery should be basically restricted to those 20, not
17 to others."

18 THE COURT: Right.

19 MR. GALBRAITH: And she made it clear that if
08:35:46AM 20 we needed some for fact witness purposes, we could take
21 some discovery regarding others and some basic discovery
22 regarding others, but we were to focus on a group that was
23 picked, chosen by the plaintiffs with no input from anybody
24 else from the Court, from random or from defendants. And
08:36:05AM 25 so, it was talked about how these would be the, quote, most

1 plaintiffs favorable Bellwether group. And that could
2 present some problems for offensive collateral estoppel in
3 the future.

4 MR. BUZBEE: Your Honor --

08:36:19AM

5 MR. GALBRAITH: In other words, there was no
6 agreement.

7 MR. BUZBEE: -- there's no agreement. For
8 instance, like in New Orleans, we have probably 80,000 of
9 these FEMA cases. We -- we've tried two now, and we're
10 going to try probably four more, with the idea again being
11 once we get an idea of what these things are worth, let's
12 huddle up and try to resolve it. So I think these first 10
13 are just a good indication of --

08:36:29AM

14 THE COURT: Well, the idea of what something is
15 worth has to have a basis, and the basis generally is
16 assumption as to liability, and then we talk about what
17 something is worth.

08:36:43AM

18 MR. BUZBEE: I think you're right.

19 THE COURT: But if you can't determine
20 liability, or if we play with the liability issue and end
21 up, for example, with 10 different -- well, we couldn't end
22 with 10 different verdicts. I guess we could end up with
23 at least three.

08:36:52AM

24 MR. BUZBEE: There's a hundred --

08:37:04AM

25 THE COURT: Finding for the plaintiff's,

1 findings for the defendants and hung jury. That's about
2 the size of it. But if we end up with that kind of a
3 combination if we were to try these in series of 10 or 15,
4 probably take us about another year or two to get these
5 done within the context of the -- my dockets.

08:37:17AM

6 We would still not have a declaration on
7 any liability issue. And, of course -- and I said not a
8 declaration, I mean we would not have a binding what
9 defense might consider to be binding liability issue. And

08:37:38AM

10 without binding liability issue, we'd never get to an
11 indication of what anything might be worth, irrespective as
12 to how reasonable the numbers might be.

13 And I'm saying that with an understanding
14 that whatever the numbers are, certainly argument now is
15 and several, at least in one respect is totally

08:37:57AM

16 unreasonable, but assuming that you had reasonable
17 determinations that the parties could agree on within
18 reason, you would not necessarily agree to resolve any
19 balance because, it seems to me, you would want to resolve

08:38:14AM

20 through the Circuit Courts looking -- looking at you,
21 Ken -- you don't want to resolve through the Circuits
22 probably the issue of liability.

23 And so, we're talking about something that
24 could take five to eight years to work our way through

08:38:25AM

25 that, depending on how the Fifth Circuit works. But

1 assuming they were to remand on any issue, we would in a
2 sense be stuck with any other claims.

3 So we would either have to try them all so
4 that the Circuit can look at liability one time and make
08:38:43AM 5 that resolution, and that would be, let's say 150 or so
6 plaintiff's, more or less. And now we know they win or
7 lose, meaning liability, we'd probably still have to look
8 at resolution as relates to what the cases are worth after
9 that. So I don't know of any way we can do this.

08:39:03AM 10 MR. BUZBEE: I haven't looked at the collateral
11 estoppel issue, but obviously res judicata is not in play
12 and maybe we should have, before we tried the case, reached
13 some agreement that this was binding, at least liability
14 wise, on the remaining. But we didn't do that. So I
08:39:18AM 15 think, if nothing else, we've got to try at least another
16 10. And, now, if you as the Judge want to say, "You know
17 what? All these are in one case. We're going to try
18 liability." I think you have the discretion to do that.
19 "We're just going to try the liability case."

08:39:35AM 20 THE COURT: I don't know how much discretion I
21 have from the Circuit's perspective on this issue.

22 MR. BUZBEE: Well, if you sever these, you've
23 got a separate case.

24 THE COURT: Well, severance might be for
08:39:45AM 25 purposes of trying the others. It would simply have to be

1 for purposes of determining liability for the Circuit
2 Court. I would not want to spend my time or your time
3 trying these cases without knowing what the end of the line
4 looks like. So here's seems to me what we've got.

08:40:03AM

5 MR. GALBRAITH: A due order of pleadings, so to
6 speak.

7 THE COURT: Say again.

08:40:15AM

8 MR. GALBRAITH: A due order of pleadings, so to
9 speak. In other words, there are certain things that would
10 have to happen first before we get ahead of ourselves. In
11 other words, when there's no collateral -- I mean no res
12 judicata.

08:40:26AM

13 THE COURT: Right. There is one of two ways it
14 would seem to me to be handled. Somehow the Court could
15 make the finding and determination that the relationship
16 between the plaintiff's is such that there is res judicata
17 on the issue of liability for purposes of setting in place
18 the foundation on which we would then have the obligation,
19 responsibility to try the damage issues as it relates to

08:40:43AM

20 each of the plaintiff's. So we would then try the damage
21 issues and come to some kind of resolution as it relates to
22 the case in its entirety. And, of course, somewhere along
23 the way I've got to raise the issues that you've raised
24 here whether I do it now or later, in terms of the -- I

08:41:00AM

25 think the main issue, at least in part, or the biggest of

1 these issues, has to do with punitive damage issues,
2 whether or not it should exist at all. And if so, what is
3 the -- what is a reasonable basis for punitive damages.

4 That would certainly posture the case in a
08:41:19AM 5 way that the entirety of the case goes up to the Circuit
6 Court. And, you know, I hate to think that they would pick
7 at it and just say, "Well, we don't like the way it came.
8 We're going to reverse it because we want to try every one
9 of these things individually," which we would know sooner
08:41:36AM 10 or later for sure. We'd certainly know that sooner.

11 But if we did not have all of that done,
12 we could certainly then determine at that point what the
13 liability would be -- I mean, what the damages would be by
14 some kind of resolution between you-all, even in the face
08:41:57AM 15 of the possibility that a second jury two years from now
16 might -- or whatever time -- might determine what liability
17 is. And certainly at that point we'd have to go back and
18 then try the liability issue as it relates to each of these
19 individuals, it would seem to me that at the very least,
08:42:20AM 20 though, the damage issues would have been resolved one way
21 or the other, either by jury verdict or by rule of law,
22 that is what we agree to be reasonable or by settlement,
23 that is, "We agree that this is what we will pay if there
24 is a jury that would find for each of the plaintiff's as it
08:42:37AM 25 relates to liability." I'm concerned that I don't want

1 both of those issues tried over and over again. That's
2 what I'm convinced of, that to do both is to lengthen this
3 case in ways, or cases in ways that could be but never
4 done, unless you-all just go case-by-case and you kind of
08:43:01AM 5 beat each other up until some day you just say, "Hey, I'm
6 tired of this. Let's get it over with," then you settle
7 it. That might be the answer too. Go ahead.

8 MR. GALBRAITH: Two things, Your Honor. I
9 apologize, Your Honor, for not introducing co-counsel
08:43:14AM 10 joining me on this matter for appeal. Scott Brister of
11 Andrews & Kurth.

12 THE COURT: I saw his name on the pleadings. I
13 knew I was in trouble. Go ahead.

14 MR. GALBRAITH: Kendall Gray, John Shely and
08:43:27AM 15 Tom Taylor.

16 Second of all, Your Honor, we know there's
17 a lot of law on collateral estoppel and res judicata
18 perhaps does not reply here. We've done a cursory look at
19 that, but I understand today is a motion for judgment
08:43:42AM 20 hearing on the trial that was had.

21 THE COURT: Right.

22 MR. GALBRAITH: And so, we would just request
23 an opportunity, if and when that becomes ripe, to examine
24 that law and present it to the Court because we think it's
08:43:53AM 25 a pretty voluminous precedent.

1 THE COURT: Okay.

2 MR. BUZBEE: Your Honor, and to dovetail on
3 that, again, I thought that this was -- I haven't even
4 looked at the remaining so many clients to see what the
08:44:07AM 5 effect of this verdict was and didn't come prepared to
6 discuss that, although I talk off the top of my head, which
7 I'm doing. But I'm here really to try to get a judgment
8 entered so we can -- because I think all their motions to
9 set aside an all that silliness is probably premature.

08:44:17AM 10 They're putting the cart before -- you've got to have a
11 judgment before you can have your post-trial motions.

12 THE COURT: Right.

13 MR. BUZBEE: And we don't have that yet. And
14 that's why I think the rule said if a judgment is not
08:44:24AM 15 entered, it says timely -- and I'm not saying you didn't
16 enter it timely -- but we wanted to get a judgment entered
17 so we could start all those time limits running. And then
18 if you did decide to sever and enter a judgment, then at
19 some point we start dealing with the remaining plaintiff's,
08:44:38AM 20 we could have -- we could talk and brief in detail all the
21 effect, if any, of the verdict on the other plaintiff's.

22 MR. BRISTER: As long as I've tried try cases
23 but I'd say, Your Honor, I think the problem is going to
24 be -- actual damages are not a big -- it's just not that
08:44:53AM 25 much involved. The jury awarded basically what the cost of

1 going -- return to the emergency room, fights over punitive
2 damages --

3 THE COURT: Right.

4 MR. BRISTER: -- or if you just try that from
08:45:03AM 5 liability, the problem is you're not going to be able to do
6 it because plaintiffs' counsel for punitive damages or
7 whether want to go want to go in 500 leads and history of
8 this, that and the other. And, of course, we're going to
9 want to defend on each one of those. You're going to end
08:45:17AM 10 up on the punitive damages trying liability again anyway.

11 So I just think it's going to be
12 difficult, other than the actual damages, it's going to be
13 difficult to have a trial just on damages without doing the
14 liability anyway.

08:45:29AM 15 MR. BUZBEE: And I think we solved that problem
16 because we thought about -- we thought about trying to make
17 a discrete issue on punitives, and I think we all figured
18 out that would be very difficult to do.

19 THE COURT: All right. So I think I did enough
08:45:45AM 20 discussion on the several sides of this to -- let me ask
21 Jim. Why would not you want us to sever this?

22 MR. GALBRAITH: I'm sorry, Your Honor?

23 THE COURT: Why would you not want me to go
24 ahead sever and let this go to the Circuit Court now?

08:45:59AM 25 MR. GALBRAITH: Our response does not take

1 issue with the severance portion of their request.

2 THE COURT: Okay. I see.

3 MR. GALBRAITH: We.

4 THE COURT: But you -- go ahead. Your response
08:46:08AM 5 and your concern has to do with punitive damages, I gather.

6 MR. GALBRAITH: We have preserved, we believe,
7 appeal and we will be preserving appeal post-judgment
8 motions as he had mentioned, timely. That is our intent.
9 And we -- I'm not going to say we're anxious to appeal
08:46:27AM 10 this, but we're ready and we're intent upon doing so, and
11 we'll do it timely according to the Rules.

12 THE COURT: All right. Sounds to me like what
13 I need to do is just go ahead and do what would normally
14 occur in the processes in this proceeding, and that is to
08:46:45AM 15 enter judgment, entertain your motion for the -- on the
16 issue of exemplary damages, make that resolution in a final
17 judgment, and then let the nature take its course, the
18 legal nature take its course.

19 The question then would be: What is your
08:47:03AM 20 preference as it relates to trials in the interim? What
21 would you -- one of the problems that I am concerned about
22 is trying the case and the Circuit Court then saying, "We
23 want you to do it a certain way." And I don't mean that in
24 a bad way, but I mean in the sense of the presentation of
08:47:25AM 25 the case to the jury. It would seem to me this would all

1 go on hold, in a sense, until the Circuit Court speaks to
2 the liability issue as relates to these plaintiffs because
3 if that model is not going to work, it's just not going to
4 work.

08:47:39AM

5 MR. GALBRAITH: It's a great concern and one
6 that we have grave concerns about, and it's one of those
7 that we mentioned that there isn't, we think, a lot of law
8 on, and at the proper time we would like an opportunity to
9 present to the Court. I think it will impact the Court's
10 decision.

08:47:54AM

11 THE COURT: I'm trying to avoid the paper
12 weight here. I'm trying to give you a sense of my thought
13 so that I avoid some of the weight of the paper so that I
14 don't have these 10-pound motions dropping on me while I'm
15 thinking about this. So my concern is not only making this
16 available making the -- going forward movement available to
17 both sides, that is, by getting a judgment in place, but
18 also to see if there is some room for agreement, let's say,
19 as it relates to how these remaining plaintiffs ought to
20 be handled, understanding that time is going to be a factor
21 at the some point if the Circuit Court sits here for a year
22 or two. We could have people who were ill or -- some of us
23 are going to die between now and 2011, '12. So that's just
24 something that we have -- and I don't mean we in the room
25 necessarily. I mean we in general.

08:48:50AM

1 You could certainly have some plaintiffs
2 who would be unable to attend, and the expense, I suppose,
3 of doing depositions could be just horrendous. I mean, it
4 would just be totally outrageous to do a hundred
08:49:09AM 5 depositions or 120 depositions, for that matter. And the
6 only issue, it seems to me that you would want to depose on
7 would be not so much on what the plaintiffs "suffered"
8 because I believe that it seems to me that the status of
9 the law, the status of the facts are that we're talking
08:49:34AM 10 about the kind of damages that would be available to a
11 plaintiff based upon diagnostic procedures, as opposed to
12 treatment.

13 So, I mean, it's not something that's ever
14 going to change unless somebody is suffering from something
08:49:52AM 15 now. For example, I mean, if you do a CT or whatever back
16 in 2009, that price is going to be there. If you did three
17 followups to the doctor for \$100 a piece, and so your total
18 medical is \$2500, that's it. What's there to argue about?
19 You might say it shouldn't be, but I'm not sure that the
08:50:14AM 20 focus of your case is on whether or not those were
21 reasonable and necessary diagnostic tests, but whether or
22 not you have any liability that would require you to pay
23 the diagnostic test itself. They pay for those. And
24 that's where I'm concerned about, that's where I'm
08:50:34AM 25 concerned about as relates to the question of discovery,

1 because the discovery as it relates to liability is in
2 place, unless something new has happened.

3 It's going to be the same discovery that
4 we've tried. The diagnostic costs are in place. Everybody
08:50:53AM 5 can know that. That's not an issue in dispute, in terms of
6 the amount, I don't think, and perhaps not even the
7 reasonableness of those, those of what doctors charge. And
8 I'm not sure if -- I'm looking at you, Mr. Busby. I'm not
9 sure if there is anything else in there that would be kind
08:51:16AM 10 of a wild card where somebody says, "In addition to
11 diagnosis, I spent the next six months in the hospital or
12 the six, you know, getting treatment. And, therefore, my
13 expenses --" and we have one plaintiff I believe whose
14 expenses were way out there, in terms of and in
08:51:35AM 15 relationship to the other plaintiffs. I'm just not sure.

16 So it may be that we're not really --
17 we're not going to lose anything, but it would seem to me
18 that there ought to be some way to preserve that without
19 having to depose those parties and go to that with expense,
08:51:54AM 20 assuming that the Circuit Court disagrees with, let's say,
21 the liability aspect, we would not be spending time trying
22 some of those issues or trying to recover some of those
23 issues.

24 MR. BUZBEE: May I be heard on that, Your
08:52:07AM 25 Honor?

1 THE COURT: Sure.

2 MR. BUZBEE: I think it's fully within your
3 discretion, if you believe that the liability part of the
4 case has been fully explored -- which obviously I believe
08:52:14AM 5 it was -- you can limit or prevent depositions on that
6 issue. And with regard -- I mean, I think BP --

7 THE COURT: What would you be doing discovery
8 on?

9 MR. BUZBEE: It wouldn't be me.

08:52:27AM 10 THE COURT: If going forward with the other
11 cases, what would you be doing?

12 MR. BUZBEE: I wouldn't be doing anything other
13 than defending depositions because I feel quite confident
14 with the history I have with BP, they're at least going to
08:52:39AM 15 want, before the next trial, to depose these plaintiffs who
16 would be in the next trial group.

17 Now, remember that's their discovery, not
18 mine.

19 THE COURT: Right.

08:52:46AM 20 MR. BUZBEE: So, what I would suggest, because
21 they're going to want to do that -- and, frankly, I think
22 they have the right to do it -- you could limit that to
23 one hour just so they could explore, "Look, what is your
24 story, and what is your damage?" And they should be able
08:52:59AM 25 to, if they do it correctly, do that in an hour. But I

1 think that -- I'm not sure -- I mean, you can do whatever
2 you want, obviously, but I don't think it would be proper
3 to say no depositions.

4 But I think they are -- I don't know why

08:53:11AM 5 I'm being so fair, but I guess when I'm sitting on a a
6 hundred-million dollar verdict I can be a lot fairer.

7 THE COURT: Being fair or not fair I don't
8 think that's the issue because at some point they would
9 entitled to some discovery, .

08:53:22AM 10 MR. BUZBEE: Yeah. They're gonna get.

11 THE COURT: It's whether or not that discovery
12 is worthwhile --

13 MR. BUZBEE: Well, I think one hour --

14 THE COURT: -- in this process. And the reason
08:53:28AM 15 I say it that way is because what could you discover now
16 that would be of any value to you two years from now that
17 won't be the same value to you two years from now if
18 necessary?

19 MR. BUZBEE: First of all, I want to say this.

08:53:42AM 20 I mean, I know judicial economy, you may be leaning towards
21 saying, "Look, I'm not going to try another 10 or 20 of
22 these until the Circuit speaks on this issue," but I would
23 say this to that: These other 150 some-odd plaintiffs
24 deserve their day in court, and I don't think it's fair for
08:54:01AM 25 them to have to sit and wait to determine whether the Fifth

1 Circuit thinks you did something right or wrong, or I did
2 something right or wrong and whatnot. I don't think that's
3 right. I think you, as a judge, appointed by the
4 president, you make decisions that until the Fifth Circuit
5 overrules --

08:54:19AM

6 THE COURT: But they were appointed by the
7 president too.

8 MR. BUZBEE: True. True. My point is --

9 THE COURT: By a different president, but
10 nevertheless.

08:54:26AM

11 MR. BUZBEE: Right. Right. I understand. You
12 made decisions that until they're overturned, that is the
13 law of this case. And, frankly, you may change your mind
14 because you made rulings on evidence based on what was

08:54:40AM

15 before you at the time. And every case, anybody that tries
16 a lot of cases know every case goes differently. But the
17 point is these remaining 150 some-odd plaintiffs are
18 entitled to their day in court just like the first 10 were.

19 And I don't think it's proper, and it would be manifestly

08:54:55AM

20 unfair to these plaintiffs to say, "Let's just sit and wait
21 and make sure the first trial was done correctly."

22 I would suggest and urge you on behalf of
23 the remaining plaintiffs for you to, whether you want to
24 try 10, 20 or even 50 -- I don't care -- let's tee up

08:55:09AM

25 another one, because if there's going to be a resolution.

1 There may not ever be one in this case, but if there's
2 going to be one, the only way you're going to get
3 resolution is set trial dates, set deadlines, and let's get
4 going.

08:55:21AM

5 THE COURT: Well, that's the concern I have,
6 Mr. Buzbee.

08:55:33AM

7 MR. BRISTER: Three things, Your Honor: First
8 of all, we would request the Court to stay the rest of the
9 cases during appeal. If the Court does not, we'll be
10 asking the Circuit Court to do that, and that's because
11 there's no point in doing even the discovery, even the
12 depositions, without knowing, for example: Is this a
13 punitive damages case or not? I have little doubt that if
14 we get -- when we resolve the question, if as we believe
15 this is not punitive damages cases, we're not going to have
16 to try any of these, the amount of money involved in the
17 plaintiffs actual damages is less than they're going to
18 have to pay me and Mr. Gailbraith and everybody else to
19 come down and try these. If we can get a dispositive
20 ruling on that, if we're right or wrong on that. But if
21 the Circuit Court says we're right on that, "These are not
22 punitive cases," which was what I was hoping to argue
23 today, then we're wasting our time on everything else.

08:56:06AM

08:56:19AM

24 THE COURT: Let me just speak to that -- and,
25 Mr. Buzbee, to not step on or rain on your parade -- I'm

1 seriously concerned of punitive damages. In fact, I don't
2 believe the punitive damages as they exist can stand.
3 That's an issue I think I'm going to have to resolve
4 against the current plaintiffs. And it concerns me for
08:56:36AM 5 several reasons: One, because now we don't have a punitive
6 damage issue, punitive damage award in place. If I were to
7 rule the way that defendants want me to rule, it would mean
8 that we would not be trying, we could not try the remaining
9 plaintiffs on that punitive damage issue because they're
08:56:55AM 10 arguing that punitive damages ought to be -- well, whether
11 statutorily or not, they're way beyond what would be
12 reasonable under these circumstances, which is not you -- I
13 share that view -- the problem is I don't have a formula
14 for figuring out what that -- what a reasonable punitive
08:57:15AM 15 damage award would be -- at least I don't have a look at
16 that -- in light of the request to enter a judgment. And
17 so, I've either got to come up with some determination of
18 my own. And if I'm to award, say, an award of punitive
19 damages should be made, or I'm going to have to say, "No,
08:57:40AM 20 it should not," and let the Circuit Court make that
21 determination and simply award actual damages as to -- I
22 say "actual," whatever those damages are -- short of
23 punitive damages so that that is an issue for the Circuit
24 Court, which then puts a common block to some extent in the
08:57:57AM 25 way of the question of, well, it may not. If I determine

1 that it shouldn't at all, then I would be trying them on
2 that basis and might have to retry every one of them.
3 That's one of the concerns.

4 MR. BRISTER: If I could just -- I'm sensitive
08:58:09AM 5 to everybody entitled a day in court, but this is not a car
6 wreck case. This is a mass tort case, and mass tort cases
7 get tried differently and the first view are reviewed much
8 more stringently because it's a new and unexplored cause of
9 action, whether it's asbestos -- start of an asbestos or
08:58:26AM 10 toxic suit or whatever else. And until the rules are laid
11 down, really, we can waste a lot of time and money doing
12 stuff that's going to -- they're going to end up saying is
13 not necessary. As to the --

14 THE COURT: Go ahead.

08:58:38AM 15 MR. BRISTER: As to -- finally, just as to the
16 weight of the paper, the reason we limited our -- we're
17 concerned about. And the reason we limited what we filed
18 today to punitive damages because most of the rest of it
19 that Your Honor, the other issues were going to raise, we
08:58:53AM 20 will -- we will and give you a lot of paper on that
21 post-judgment. We were hoping to do punitive damages
22 before judgment because it's more a discrete issue. And,
23 as I said, these are issues, the cap busters and
24 constitutional limits on punitive damages, these are things
08:59:10AM 25 that haven't been presented, couldn't have been presented

1 until you get an award. If Your Honor doesn't want to
2 entertain argument on those today --

3 THE COURT: No, I don't. I really don't.

4 MR. BRISTER: Well, I've got -- I request

08:59:20AM 5 permission --

6 THE COURT: Later.

7 MR. BRISTER: Well, we got a reply at 6:30, I
8 personally got it about 8:00 on Monday night. And I've got
9 several things I'd like to point out about that. It won't

08:59:30AM 10 be long, but we would request permission --

11 THE COURT: No. Go ahead and file it. I'm not
12 going to do this on my lunch break.

13 MR. BRISTER: I understand.

14 THE COURT: This is going to take a little bit
08:59:40AM 15 more time than that.

16 MR. BRISTER: We will keep it short, but there
17 are a couple of points that we need to present.

18 THE COURT: I think what I'm being told -- and
19 this is not to confess anything -- I think I'm being told I

08:59:53AM 20 really have to do the hard work here, make the decisions
21 and the calls because there is no room for agreement, and
22 then decide at the appropriate time whether or not the
23 case, the other remaining plaintiffs should go forward.
24 That's what I'm hearing.

09:00:05AM 25 MR. BUZBEE: Your Honor, just that --

1 THE COURT: And I need to have a clear path,
2 and that's going to have to be the one that I cut myself.
3 Y'all are not going to help me. Yes, sir?

4 MR. BUZBEE: And just so you know, a lot of
09:00:16AM 5 evidentiary argument is being made in the case, but we
6 don't have a transcript to make those arguments, other than
7 my three-way memory because I sat through this grueling
8 process. So, you know, I think the way it's supposed to
9 work, at least it's always worked, is you enter the
09:00:31AM 10 judgment, and then we get the transcript. If we need more
11 time, then we make our arguments on post-judgment about
12 whether punitives are constitutional and whether they're
13 capped and all of that silliness. You know, we're not
14 really prepared on this side to do that. I think they paid
09:00:46AM 15 for daily copy, so they may have the transcript. I frankly
16 don't have it, other than my alcohol tainted memory.
17 That's all I got.

18 THE COURT: All right. Well, I'll do it.

19 MR. BUZBEE: All right.

09:00:58AM 20 THE COURT: And then I'll make that -- I'll
21 make that call. Probably take me maybe 10 days or so to
22 get this done. I'll go ahead and do it so we can move it
23 along.

24 MR. BRISTER: We'll get a response to you this
09:01:11AM 25 week.

1 THE COURT: You need to do it this week. I'm
2 going to be out. I hope to have this done before the end
3 of the month. So that's your time frame.

4 MR. BRISTER: All right.

09:01:19AM

5 THE COURT: Anything else, gentlemen?

6 MR. GALBRAITH: Thank you, Your Honor.

7 MR. BUZBEE: No, sir. Thank you, Your Honor.

8 THE COURT: All right. Have a good day.

9 **(Recessed at 9:01 a.m.)**

10 **COURT REPORTER'S CERTIFICATE**

11

12 I, Johnny C. Sanchez, certify that the foregoing is a
13 correct transcript from the record of proceedings in the
14 above-entitled matter.

15

16 /s/
Johnny C. Sanchez, CRR, RMR

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